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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

DANNIE FOUNTAIN, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

YOUMAIL, INC., a Delaware corporation,

Defendant.

Case No. **'12CV2967 DMS WVG**

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Dannie Fountain (“Plaintiff” or “Fountain”) brings this Class Action Complaint (“Complaint”) against Defendant YouMail, Inc. (“Defendant” or “YouMail”) to stop its practice of making unauthorized text message calls to the cellular telephones of consumers nationwide, and to obtain redress for all persons injured by its conduct. Plaintiff, for her Complaint, alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

NATURE OF THE ACTION

1. Defendant is a well-known provider of premium voicemail products and services. Defendant’s flagship product is a “visual voicemail” smart-phone application, which transcribes voicemail-audio to text so that users are able to read their voicemail messages. To promote its products and brand, Defendant made (or directed to be made on its behalf) unauthorized text

1 Defendant because Defendant conducts significant business transactions in this District, solicits
2 customers in this District, and because Defendant makes unauthorized text message calls to
3 putative Class members located in this District.

4 8. Venue is proper in this District under 28 U.S.C. § 1391 because Defendant
5 conducts significant business transactions in this District, solicits customers in this District, and
6 because Defendant makes unauthorized text message calls to putative Class members located in
7 this District.

8 **COMMON FACTUAL ALLEGATIONS**

9 9. In recent years, marketers who often have felt stymied by federal laws limiting
10 solicitation by telephone, facsimile machine, and e-mail have increasingly looked to alternative
11 technologies through which to send bulk correspondence cheaply.

12 10. A “Short Message Service” or “SMS” is a messaging system that allows cellular
13 telephone subscribers to use their cellular telephones to send and receive short text messages,
14 usually limited to 160 characters.

15 11. An “SMS message” is a text message call directed to a wireless device through
16 the use of the telephone number assigned to the device. When an SMS message call is
17 successfully made, the recipient’s cell phone rings, alerting him or her that a call is being
18 received. As cellular telephones are inherently mobile and are frequently carried on their owner’s
19 person, calls to cellular telephones, including SMS messages, may be received by the called
20 party virtually anywhere worldwide.

21 12. Beginning in or around January 2012, Defendant initiated a particularly egregious
22 text message marketing campaign to promote its visual voicemail products.

23 13. That is, in an attempt to build its customer base, Defendant began intercepting and
24 retaining the cellular telephone number of every consumer (including Plaintiff Fountain and the
25 putative Class) who leaves a voicemail for any YouMail customer, so that it can later make
26 promotional text message calls to their cellular telephones.

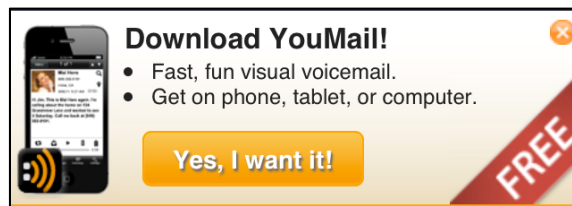
1 14. More specifically, when consumers call and leave voicemails for a YouMail
2 customer—via Defendant’s service—Defendant intercepts and retains their cellular telephone
3 numbers. Thereafter, Defendant makes a text message call to the caller that includes an
4 advertisement for its products and services and a direct hyperlink to its website (the “YouMail
5 Promotional Text”).

6 15. For instance, in or around September 2012, Plaintiff Fountain’s cellular telephone
7 rang, indicating that a text message call was being received.

8 16. The “from” field of such transmission was identified cryptically as “52894,” a
9 format which is an abbreviated telephone number known as an SMS short code operated by
10 Defendant or Defendant’s agents. The text message call stated that it was from Defendant. The
11 body of the YouMail Promotional Text call was substantially similar to the following:

YouMail TXT Alerts: RE:
Voicemail for [name of YouMail user]
([telephone number of YouMail user]) – View:
[http://ymvm.it/\[hyperlink to YouMail’s website\]](http://ymvm.it/[hyperlink to YouMail’s website])¹

15 17. Each YouMail Promotional Text call received by Plaintiff and the putative Class
16 contained a direct hyperlink to Defendant’s website, where it heavily promoted its products and
17 services. Specifically, each webpage associated with a YouMail Promotional Text call contained
18 a large banner appearing at the top of the page that looked the same or substantially similar to the
19 advertisement shown in Figure 1 below. *See* Figure 1 (showing a screenshot of an advertisement
20 displayed on the website associated with Defendant’s YouMail Promotional Text call).



(Figure 1.)

¹ The name and cell phone number of the YouMail user whom Plaintiff Fountain left a voicemail for has been redacted, along with the web address of the hyperlink as it contains, among other things, an audio recording of the voicemail.

1 18. Tellingly, if consumers, including Plaintiff or the putative Class, pressed the
2 “Yes, I want it!” icon displayed in Defendant’s advertisement, the effect of Defendant’s text
3 message marketing campaign became apparent. That is, after consumers pressed the “Yes, I want
4 it!” icon, Defendant would immediately direct them to a mobile application store wherein the
5 consumer could download Defendant’s mobile application and register for its service (including
6 an optional paid component).

7 19. Ostensibly, Defendant made, and continues to make, the YouMail Promotional
8 Text calls to consumers so that it can solicit them to enter into commercial transactions (i.e.,
9 encourage consumers to download its mobile application and pay for its service). Notably,
10 Defendant’s own website admits that it makes the YouMail Promotional Text call so that “callers
11 can learn about and join YouMail!”

12 20. Plaintiff did not consent to, request, or otherwise desire or permit Defendant to
13 transmit or make any YouMail Promotional Text calls to her cellular telephone.

14 21. Defendant did not obtain consent from Plaintiff or the putative Class to make
15 YouMail Promotional Text calls to their cellular telephones. Moreover, none of the YouMail
16 Promotional Text calls made by Defendant provided Plaintiff or the putative Class with a
17 reasonable opportunity to opt out of receiving future YouMail Promotional Text calls.

18 22. The YouMail Promotional Text calls alleged herein were not made by any other
19 consumer and were solely made by Defendant.

20 23. Defendant made, or had made on its behalf, the same (or substantially the same)
21 YouMail Promotional Text call *en masse* to thousands of cellular telephone numbers.

22 24. On information and belief, Defendant made these text message calls to Plaintiff
23 and putative Class members using equipment that had the capacity to store or produce telephone
24 numbers to be called using a random or sequential number generator, and to dial such numbers.

25 **CLASS ALLEGATIONS**

26 25. **Class Definition:** Plaintiff brings this action pursuant to Federal Rule of Civil
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28

1 Procedure 23(b)(2) and (b)(3) on behalf of herself and a class (the “Class”) defined as follows:

2 All persons in the United States who YouMail made a text message call to, who, at the
3 time the text message call was made, was not a YouMail customer.

4 Excluded from the Class are (1) Defendant, Defendant’s agents, subsidiaries, parents, successors,
5 predecessors, and any entity in which the Defendant or its parents have a controlling interest and
6 its current and former employees, officers, and directors, (2) the Judge or Magistrate Judge to
7 whom this case is assigned and the Judge’s or Magistrate Judge’s immediate family, (3) persons
8 who execute and file a timely request for exclusion, (4) all persons who have previously had
9 claims similar to those alleged herein finally adjudicated or who have released their claims
10 against Defendant, and (5) the legal representatives, successors, or assigns of any such excluded
11 person.

12 26. **Numerosity:** The exact number of Class members is unknown and not available
13 to Plaintiff at this time, but it is clear that individual joinder is impracticable. On information and
14 belief, Defendant has made YouMail Promotional Text calls to tens of thousands of consumers
15 who fall into the definition of the Class. Class members can be identified through Defendant’s
16 records.

17 27. **Typicality:** Plaintiff’s claims are typical of the claims of other members of the
18 Class, in that Plaintiff and the Class members sustained damages arising out of Defendant’s
19 uniform wrongful conduct and unauthorized text message calls.

20 28. **Adequate Representation:** Plaintiff will fairly and adequately represent and
21 protect the interests of the Class, and has retained counsel competent and experienced in
22 complex class actions. Plaintiff has no interest antagonistic to those of the Class, and Defendant
23 has no defenses unique to Plaintiff.

24 29. **Commonality and Predominance:** There are many questions of law and fact
25 common to the claims of Plaintiff and the putative Class, and those questions predominate over
26 any questions that may affect individual members of the Class. Common questions for the Class
27 include, but are not necessarily limited to the following:

- 1 (a) whether Defendant's conduct constitutes a violation of the TCPA;
- 2 (b) whether the equipment Defendant used to make the text message calls in
- 3 question was an automatic telephone dialing system as contemplated by
- 4 the TCPA; and
- 5 (c) whether Class members are entitled to treble damages based on the
- 6 willfulness of Defendant's conduct.

7 30. **Superiority:** This case is also appropriate for class certification because class
 8 proceedings are superior to all other available methods for the fair and efficient adjudication of
 9 this controversy because joinder of all parties is impracticable. The damages suffered by the
 10 individual members of the Class will likely be relatively small, especially given the burden and
 11 expense of individual prosecution of the complex litigation necessitated by Defendant's actions.
 12 Thus, it would be virtually impossible for the individual members of the Class to obtain effective
 13 relief from Defendant's misconduct. Even if members of the Class could sustain such individual
 14 litigation, it would still not be preferable to a class action, because individual litigation would
 15 increase the delay and expense to all parties due to the complex legal and factual controversies
 16 presented in this Complaint. By contrast, a class action presents far fewer management
 17 difficulties and provides the benefits of single adjudication, economies of scale, and
 18 comprehensive supervision by a single Court. Economies of time, effort and expense will be
 19 fostered and uniformity of decisions ensured.

20 **FIRST CAUSE OF ACTION**
 21 **Violation of 47 U.S.C. § 227**
 22 **(On behalf of Plaintiff and the Class)**

23 31. Plaintiff incorporates by reference the foregoing allegations as if fully set forth
 24 herein.

25 32. Defendant made unauthorized commercial text message calls to the wireless
 26 telephone numbers of Plaintiff and the putative Class using equipment that, upon information
 27 and belief, had the capacity to store or produce telephone numbers to be called, using a random
 28

1 or sequential number generator.

2 33. These text message calls were made *en masse* and without the prior express
3 consent of the Plaintiff and the other members of the putative Class.

4 34. Defendant has, therefore, violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result of
5 Defendant's illegal conduct, Plaintiff and the members of the putative Class suffered actual
6 damages and, under section 227(b)(3)(B), are each entitled to, *inter alia*, a minimum of \$500 in
7 damages for each violation of such act.

8 35. Because Defendant's misconduct was willful and knowing, the Court should,
9 pursuant to section 47 U.S.C. § 227(b)(3), treble the amount of statutory damages recoverable by
10 the Plaintiff and the other members of the putative Class.

11 **PRAYER FOR RELIEF**

12 **WHEREFORE**, Plaintiff Dannie Fountain, individually and on behalf of the Class, prays
13 for the following relief:

- 14 (a) An order certifying the Class as defined above, appointing Plaintiff
15 Fountain as the representative of the Class, and appointing her counsel as
16 Class Counsel;
- 17 (b) An award of actual and statutory damages;
- 18 (c) An injunction requiring Defendant to cease all unauthorized text message
19 activities, and otherwise protecting the interests of Plaintiff and the Class;
- 20 (d) An award of reasonable attorneys' fees and costs; and
- 21 (e) Such other and further relief that the Court deems reasonable and just.

22 **JURY DEMAND**

23 Plaintiff requests a trial by jury of all claims that can be so tried.
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Respectfully submitted,

Dated: December 12, 2012

DANNIE FOUNTAIN, individually and on behalf
of all others similarly situated,

By: /s/ Sean P. Reis

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**Pro hac vice admission to be sought*

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